Office Supreme Court, U.S.
FILED
MAY 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 1085

MILTON PARNESS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

SEYMOUR KLEINMAN
Counsel for Petitioner
60 East 42nd Street
New York, New York 10017

Of Counsel:
MARVIN B. TEPPER
LAWRENCE K. FEITELL

TABLE OF CONTENTS

	PAGE
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
a. The government failed to establish, by proof independent of the hearsay statements of two alleged co-conspirators awaiting trial, petitioner's connection with and knowledge of the scope and purpose of the alleged conspiracy	4
b. The hearsay references to "Milt" by the alleged co-conspirators provided the only basis upon which the jury could have found that petitioner participated in the conspiracy	10
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	19
APPENDICES	
A—Statutory Provisions Cited	1a
B—Opinions and Judgments Below	3a
A. Opinion of the Court of Appeals	3a
B. Letter Opinion of the District Court	4a
C. Judgment of the Court of Appeals	9a
D. Judgment of Conviction in the District Court	11a

TABLE OF AUTHORITIES

PAGE

Cases:

American Cyanamid Co. v. Sharff, 309 F. 2d 790 (3 Cir. 1962) 15

Butler v. United States, 197 F. 2d 561 (10 Cir. 1952) 15

Dahly v. United States, 50 F. 2d 37 (8 Cir. 1931) 13
Direct Sales Company v. United States, 319 U. S. 703 13

Glasser v. United States, 315 U. S. 60 13, 16

Harlow v. United States, 301 F. 2d 361 (5 Cir. 1962), cert. den. 371 U. S. 814 16
Harms v. United States, 272 F. 2d 478 (4 Cir. 1959) 16

Ingram v. United States, 360 U. S. 672 13

Krulewich v. United States, 336 U. S. 440, concurring opinion of Jackson, J. 16

Mazurosky v. United States, 400 F. 2d 958 (9 Cir. 1939) 13
Minner v. United States, 57 F. 2d 506 (10 Cir. 1932) 13

Taylor v. United States, 260 F. 2d 737 (D. C. Cir. 1958) 13
Twitchell v. United States, 313 F. 2d 425 (9 Cir. 1963) 13

United States v. Aviles, 274 F. 2d 179 (2d Cir. 1960) 14
United States v. Crimmins, 123 F. 2d 271 (2 Cir. 1941) 16, 18
United States v. Di Re, 332 U. S. 581 13
United States v. Fabric Garment Co., 262 F. 2d 631 (2 Cir. 1958) cert. den. 359 U. S. 989 14
United States v. Falcone, 311 U. S. 205 13

PAGE

United v. Moloney, 200 F. 2d 344 (7 Cir. 1952) 13, 15
United States v. Neff, 212 F. 2d 297 (3 Cir. 1954) 18
United States v. Pagano, 224 F. 2d 682 (2 Cir. 1955) 16
United States v. Rappaport, 292 F. 2d 261 (3 Cir. 1961) 15
United States v. Woll, 157 Fed. Supp. 704 (D. C. E. D. Pa., 1957) 13

Van Huss v. United States, 197 F. 2d 120 (10 Cir. 1952) 14

Williams v. United States, 289 F. 2d 598 (9 Cir. 1961) 16

Statutes:

18 U. S. C.
Section 351 3
Section 2314 3

28 U. S. C.
Section 1254(1) 2

Federal Rules of Criminal Procedure, Rule 7(f), 18 U. S. C. 18

IN THE

Supreme Court of the United States

October Term, 1963

No. .....

MILTON PARNESS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Milton Parness, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 13, 1964.

Citations to Opinions Below

The letter opinion of District Judge WORTENDYKE denying petitioner's motion for a new trial (Rec. pp. 592a-596a), is unreported and is printed in Appendix B hereto, *infra*

pp. 4a-8a. The unreported per curiam opinion of the Circuit Court of Appeals affirming the conviction (Rec. Vol. I, Additional Papers, p. 2) is printed in Appendix B hereto, *infra*, p. 3a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 13, 1964 (Rec. Vol. I, Additional Papers, post p. 312a; Appendix B, hereto, *infra*, pp. 9a-10a).

On April 2, 1964, Mr. Justice BRENNAN signed an order granting petitioner an extension of time in which to file the instant petition to and including May 11, 1964. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented for Review

1. Can petitioner's conviction for conspiracy be sustained if, apart from the *hearsay* assertions of two alleged co-conspirators awaiting disposition of their own cases, there was no proof "aliunde" connecting petitioner to the alleged conspiracy and indicating his knowledge of either its purpose or scope?

2. Can petitioner's conviction for conspiracy be sustained if the government failed to establish that petitioner *knew* that one of the objects of the alleged conspiracy was to transport the securities in question *in interstate commerce*?

3. After the government furnished a bill of particulars indicating that the alleged stolen securities involved in

each count were the same, did the later admission into evidence of testimony concerning entirely different securities constitute reversible error especially where such testimony was comprised almost entirely of the hearsay statements of the alleged co-conspirators?

Statutes Involved

The statutory provisions involved are Sections 371 and 2314 of Title 18 U. S. C. They are printed in Appendix A, *infra*, pp. 1a-2a.

Statement of the Case

Petitioner and a co-defendant, Grimmett, were indicted on May 17, 1962, by a Federal grand jury sitting at Newark, New Jersey (Rec. pp. 6a-9a). The charges set forth by the grand jury against petitioner constituted crimes against the United States under Title 18 U. S. C. Secs. 371 and 2314 and were, accordingly, cognizable in the United States Federal District Court for the District of New Jersey where the indictment was filed. The first count of the three-count indictment charged that petitioner, the co-defendant Grimmett, two named co-conspirators—Favata and MacLaren—and others unknown to the grand jury, conspired to transport between New York City, East Paterson, New Jersey, New York City, and Oklahoma City, securities of a value of more than $5,000, knowing the same to have been stolen and forged; further, that it was a part of such conspiracy that "approximately $1,000,000 of stolen securities would be sold" by petitioner to Grimmett with

the understanding that these would be forged and pledged as collateral for loans (Rec. pp. 6a-8a).

Count two charged petitioner and Grimmett with the substantive crime of transporting stolen securities from New York to New Jersey. Count three, alleging the same dates, charged in effect that petitioner and Grimmett had caused the transportation back into New York City of the same securities in a forged, altered, and counterfeited state (Rec. pp. 6a-9a).

Petitioner was found guilty on the conspiracy count and acquitted of the two substantive crimes charged. The defendant Grimmett was convicted on all counts (Rec. pp. 502a-503a). Petitioner was sentenced to five years imprisonment (Rec. p. 597a), and is presently at liberty, on bail. He has never before been convicted of a crime.

a. The government failed to establish, by proof independent of the hearsay statements of two alleged co-conspirators awaiting trial, petitioner's connection with and knowledge of the scope and purpose of the alleged conspiracy.

In order to establish petitioner's guilt upon the charge of conspiracy it was necessary for the government to demonstrate that petitioner was a member of the conspiracy alleged in the first count of the indictment, that he acted in furtherance of such conspiracy, and that he knew of its scope and purposes. While the record herein is replete with instances of the hearsay assertions of alleged conspirators unknown to petitioner concerning what petitioner's co-defendant had said about one "Milt" (petitioner's first name is "Milton"), there is not an iota of independent proof connecting petitioner to the alleged conspiracy.

Against this background, we set forth the government's proof as it bears upon this issue.

The proof adduced by the government tended to establish that various so-called "blue chip" securities were stolen from the homes of one Bernard Hans and Fred Plafe during the spring and summer of 1961, and that these were the securities which the defendant Grimmett had caused to be forged and pledged to an Oklahoma insurance company in late November 1961, as collateral for a loan. The pledge and securities came to the attention of the authorities in February 1962, when the securities were sold in the open market by the insurance company after Grimmett had defaulted in repaying the loan.

The only proof *aliunde* offered by the Government to establish petitioner's connection and commitment to the conspiracy came from the government witnesses Orseck and Gullifur. None of the government's other witnesses knew petitioner and none had dealt with him either directly or indirectly.

Orseck testified that he is a lawyer and that Grimmett, a client, arranged to see him at Orseck's office in New York City in late September or early October 1961 (Rec. p. 32a). Orseck knew Grimmett was an officer of American States Oil Co. whose stock was traded over the counter (Rec. p. 34a). Grimmett entered Orseck's office with "Bernard Hans"—not the same person produced by the government as the true owner of the stocks here involved—, petitioner, and an unidentified person who seated himself at the other end of the room. Orseck did not know in what order these visitors had first arrived at his waiting room (Rec. pp. 33a, 35a-36a). Grimmett explained that "Hans" was interested in purchasing American States Oil stock (Rec. p. 35a) and

"Hans" stated that he did not have cash to complete the transaction but would pay for the stock with securities in his possession (Rec. p. 35a). Grimmett said he intended to pledge the securities to be provided by "Hans" as collateral for a loan (Rec. pp. 37a-38a). Grimmett asked to see the securities and, after receiving an envelope, stepped out of the room with Parness (Rec. pp. 36a-37a). Thereafter, the two returned and "he" (apparently Grimmett) handed Orseck some of the securities bearing the name Bernard Hans (Rec. p. 37a). There were no endorsements on the securities and Orseck observed that it was pointless to proceed until they were endorsed and the signatures had been guaranteed (Rec. p. 40a). "Hans" said that he would have them endorsed and Parness stated that "Hans" would bring enough securities the next day to cover the entire transaction (Rec. pp. 39a-41a). "Hans" sought to establish his identity with a business card, but Orseck would not proceed without the required endorsements (Rec. p. 41a).

The following morning Orseck, Grimmett, petitioner, and "Hans" met again in Orseck's office (Rec. p. 41a). The securities were still unendorsed and "Hans" excused himself to go to a bank to have the certificates endorsed and guaranteed. The others remained behind (Rec. p. 42a). At about 1:30 p.m. "Hans" telephoned explaining that he was delayed. "Hans" never returned and the waiting group disbanded in the middle of the afternoon (Rec. pp. 43a-44a).

Gullihur testified that he is the son-in-law of Grimmett and that on January 1, 1962, he came to New York City pursuant to Grimmett's instructions to deliver two $25,000 checks to petitioner (Rec. pp. 362a-364a). The checks were payable to the order of Gullihur. He did not

know what the $50,000 was for and his only instructions were to deliver the checks (Rec. p. 377a). The next day he met with petitioner who refused to accept the checks which Gullihur had endorsed in blank (Rec. pp. 364a, 366a). In the presence of petitioner, Gullihur telephoned Grimmett who was "ill in bed" in Oklahoma (Rec. p. 366a). Gullihur testified that, in accordance with Grimmett's instructions to him, he cashed the checks and delivered the proceeds to petitioner (Rec. pp. 367a-368a). He subsequently saw petitioner and thereafter returned to Oklahoma (Rec. pp. 370a-372a).

As previously indicated, the foregoing constituted the entire sum and substance of the government's offer of proof—independent of the hearsay statements of alleged co-conspirators—to establish petitioner's alleged criminal involvement in the conspiracy set forth in the first count of the indictment. Despite the very meagre nature of this testimony, petitioner took the stand and testified fully with respect to the incidents described by Orseck and Gullihur. As the following material indicates, nothing testified to by petitioner in any fashion supplied the government with the missing ingredients of its case.

Petitioner testified that in September 1961, in connection with business dealings in California with a friend of his, Stillwell, an officer of Banker's Life & Casualty Company, he met a man named Ray Baker (Rec. pp. 418a-419a). On or about October 11, 1962, Baker introduced him to the defendant Grimmett in New York, who told petitioner he was in need of money for oil-drilling operations of his company at Long Beach, California (Rec. pp. 420a-421a). It was suggested that petitioner act as an intermediary for Grimmett with Stillwell to effect a borrowing of funds

from Stillwell's company (Rec. p. 422a). Petitioner got in touch with Stillwell, who refused to make a loan on over-the-counter stocks (Rec. pp. 422a-423a).

A day or so later, Baker telephoned petitioner and told him that a friend of his had some "blue chip" stocks which he was willing to pledge with Grimmett (Rec. p. 423a). Petitioner came to New York to see Baker and was introduced by him to a "Bernard Hans" (Rec. pp. 424a-427a). Some time thereafter, petitioner went to the office of Grimmett's attorney, Orseck, where he met Grimmett (Rec. p. 427a). While waiting there, "Hans" came in with another man (Rec. p. 427a). Petitioner had brought no stocks with him, but "Hans" had (Rec. p. 427a). Thereafter, the party entered Orseck's inner office and there petitioner asked "Hans" if he had brought the securities with him (Rec. p. 428a). "Hans" handed the securities to petitioner who thumbed through them (Rec. p. 428a). Petitioner then handed the securities to Grimmett who passed them on to Orseck (Rec. p. 428a). "Hans" stated that there were "Around three or four hundred thousand dollars" in securities and that he would "bring the rest when they are needed" (Rec. pp. 428a-429a). Orseck then observed that the securities had not been endorsed, that endorsements were necessary, and that the signature required bank certification (Rec. p. 429a). "Hans" offered various indicia of identification which Orseck rejected while stating the matter should be put over for a day pending endorsement and certification of the securities (Rec. p. 429a).

The following morning, the group reconvened at Orseck's office (Rec. p. 430a). As "Hans" had still not procured the necessary endorsements and certifications, he left

the meeting to visit a bank in Queens County, New York, to put the securities in order (Rec. p. 430a). At 1:30 p.m. "Hans" telephoned that he was delayed (Rec. p. 430a). After about an hour, Orseck excused himself and the meeting ended without the return of "Hans" (Rec. p. 431a). Petitioner never saw "Hans" again and so far as he knew, the Orseck transaction was never completed (Rec. p. 431a).

Concerning Gullihur, petitioner stated that on January 2, 1962, Gullihur telephoned him from New York City and introduced himself as Grimmett's son-in-law (Rec. pp. 435a-436a). Gullihur explained that he was having difficulty cashing some checks and requested petitioner's assistance (Rec. p. 436a). Petitioner visited Gullihur, but as it was late in the day the banks were closed and he could be of no assistance (Rec. p. 436a). Gullihur telephoned Grimmett who asked petitioner to help in the matter and petitioner agreed to this, advising Gullihur that in the event Gullihur could not cash the checks in New York the following day, petitioner would arrange to do so at his own bank in New Jersey (Rec. p. 437a).

A few days later Gullihur telephoned petitioner stating he had cashed the checks, was "tired of laying around [his] hotel" and wanted to join petitioner for dinner (Rec. 437a). Petitioner arranged to have a drink with Gullihur later that night (Rec. p. 437a). Petitioner denied ever asking for or receiving any cash from Gullihur (Rec. pp. 459a 460a, 463a).

b. The hearsay references to "Milt" by the alleged co-conspirators provided the only basis upon which the jury could have found that petitioner participated in the conspiracy.

Apart from the testimony of Orseck and Gullihur, the government's case depended almost entirely upon that of the alleged co-conspirators Favata and MacLaren whose testimony was for the most part identical. Both of these government witnesses had been separately indicted and were awaiting trial. They testified, in essence, that in November 1961, Grimmett informed them that he had access to stolen securities which he wanted them to endorse and certify in connection with a plan to pledge the securities as collateral for a loan (Rec. pp. 69a-80a). In return for their services, he would give them a "loan" of $50,000, of which they were in sore need in connection with their own stock brokerage business (Rec. p. 80a). Favata and MacLaren attempted, without success, to arrange for a loan on the stolen stock at their own bank (Rec. pp. 84a-85a), and twice brought the certificates into New Jersey for the purpose of either forging stock powers or endorsements upon the securities themselves (Rec. pp. 80a-90a). At about the end of November 1961, they delivered the forged securities to Grimmett in New York in connection with a loan arranged for with an Oklahoma insurance company (Rec. pp. 91a-94a).

Both Favata and MacLaren acknowledged that neither of them had ever met petitioner or dealt with him (Rec. pp. 163a, 223a, 281a-283a). Favata stated, however, that Grimmett had told him "Milt and the boys" or "Milt" had provided the stolen securities and would supply another batch apart from the one pledged with the Oklahoma in-

surance company (Rec. pp. 79a, 87a-88a, 96a, 110a, 225a and see pp. 153a, 222a, 262a). Favata had no idea, however, who "Milt" was (Rec. pp. 169a-179a) and did not hear the name "Parness" until January 1962 (Rec. pp. 222a, 225a). He admitted conspiring with MacLaren and Grimmett, but did not consider that petitioner was ever involved in his transactions with either of those two (Rec. p. 225a).

Favata gave additional testimony concerning the visit of Gullihur to New York City on January 2, 1962 (Rec. pp. 96a, 110a). In this connection he stated that Grimmett had telephoned him from Oklahoma near the end of December 1961, and informed him that "Milt" expected him, Grimmett, to be in New York with $50,000 on January 2, 1962, for another batch of securities (*Ibid.*). Thereafter, he met Gullihur and assisted him, without success, in trying to locate petitioner (Rec. p. 112a).

MacLaren, testifying similarly, stated that Grimmett told him the source of additional stolen securities would be one "Milt" (Rec. p. 262a) and that, concerning an expected delivery of stolen securities, Grimmett "had been double crossed by Milt." (Rec. p. 272a). MacLaren had no idea, however, who "Milt" was, or even whether there was any truth to Grimmett's assertions that a second block of stolen stock would actually be forthcoming (Rec. p. 283a). As far as MacLaren was concerned, petitioner had nothing whatever to do with their dealings with Grimmett and the name "Parness" meant absolutely nothing to him in the context of his transactions with Grimmett (Rec. pp. 281a, 329a).

The testimony elicited by the prosecutor from Favata and MacLaren concerning what Grimmett had told them about "Milt" so colored the jury's view of petitioner that

this testimony, insufficient as a matter of law to establish a *prima facie* case of petitioner's connection to the conspiracy, without doubt, formed the basis for the jury's finding of petitioner's participation in the alleged crime.

Testimony adduced from the witness Berger, an attorney for the Oklahoma Insurance Company, that late in January 1962, Grimmett told him "Parness" "had messed him up" (Rec. p. 346a), had a like effect and was doubly prejudicial for recalling a conversation that occurred well after the alleged conspiracy would have ended (see *infra*, Point 3, p. 19).

Reasons for Granting the Writ

1. The instant case presents another example whereby the guilt of a defendant upon a charge of conspiracy rests *not* upon independent proof of his participation in, or connection with, the conspiracy, but upon the highly suspect hearsay testimony of alleged co-conspirators awaiting the outcome of their own cases. In the case at hand, the vice of such testimony was even more flagrant, as the jury voted to acquit petitioner of each of the substantive crimes with which he was charged. We claim, therefore, that in the circumstances here depicted, the District Court erred in failing to grant petitioner's motions for judgment of acquittal on all counts, and that the court was similarly in error in denying petitioner's subsequent timely motion for a new trial. Beyond this, we urge the case for review as one which relates directly and without encumbering side issues which might blunt the point to the Court's long expressed concern that conspiracy trials not be employed as a means by which the prosecution fashions "a dragnet to

draw in all substantive crimes". *Direct Sales Company* v. *United States*, 319 U.S. 703, 711.

It has been firmly established in this Court that "a conviction for conspiracy under 18 U.S.C. 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States. *Pereira* v. *United States*, 347 U.S. 1'." *Ingram* v. *United States*, 360 U.S. 672. Such proof must establish that the party charged participated in the corrupt agreement with knowledge of its purpose. *United States* v. *Falcone*, 311 U.S. 205, 210; *Twitchell* v. *United States*, 313 F. 2d 425, 428 (9 Cir. 1963); *Dahly* v. *United States*, 50 F. 2d 37, 42 (8 Cir. 1931), and with a specific intent to commit the objects of the conspiracy. *United States* v. *Woll*, 157 Fed. Supp. 704, 707-708 (D.C. E.D. Pa., 1957); *Mazurosky* v. *United States*, 100 F. 2d 958 (9 Cir. 1939). In addition to this, and most importantly in connection with the record herein, the defendant's connection with the conspiracy must have been established independently of the assertions of alleged co-conspirators made to third parties (*Glasser* v. *United States*, 315 U.S. 60, 74-75; *Minner* v. *United States*, 57 F. 2d 506, 511 [10 Cir. 1932]; *Taylor* v. *United States*, 260 F. 2d 737 [D.C. Cir. 1958]).

The proof adduced by the prosecutor herein failed to meet any of the criteria set forth above. Insofar as petitioner's connection with the alleged conspiracy is concerned, the government was able to show only that petitioner was present at two meetings in the office of an attorney where the hypothecation of the "Hans" securities was briefly discussed (cf. *United States* v. *Di Re*, 332 U.S. 581, 593; *United States* v. *Moloney*, 200 F. 2d 344, 347. [7 Cir. 1952]). There was not a shred of evidence showing that

petitioner knew that "Hans" was an impostor, that the securities presented to Orseck had actually been stolen, or that petitioner's presence was in the knowledgeable advancement of any conspiracy to dispose of the securities (see *United States* v. *Fabri Garment Co.*, 262 F. 2d 631, 640 [2 Cir. 1958], cert. den. 359 U.S. 989). No continuous course of dealings, or "prolonged and interested cooperation" between petitioner and "Hans" or any of the others was shown which might have given rise to an inference of guilty knowledge (*United States* v. *Aviles*, 274 F. 2d 179, 189-190 [2d Cir. 1960]; *Van Huss* v. *United States*, 197 F. 2d 120, 121 [10 Cir. 1952]).

At all times during the Orseck meeting, all those present including Orseck, regarded the securities under consideration as actually belonging to "Hans", whose name appeared on the certificates themselves. The fact that the securities were touched by petitioner in Orseck's office was meaningless in the circumstances. That factor could not supply even an inference of dominion or control over the securities as all the interested parties who were present—including Orseck—handled the very same securities. And, clearly, nothing that happened in Orseck's office can supply the wholly speculative and unwarranted inference that petitioner was knowledgeably connected to some criminal combination or even knew that the securities had any unlawful origin. Further, when the first Orseck meeting disbanded, it was "Hans" alone who undertook to have the stock certificates endorsed and certified, and it was not shown that, at any time prior to, during, or after the Orseck meeting, the securities were in the possession of anyone else but "Hans". When "Hans" failed to return with the securities properly endorsed and certified,

the proposed transaction was entirely abandoned. Had petitioner actually been involved in a conspiracy to dispose of the securities in question, and concerned with their handling and safety, it is strange indeed that he never again came into the presence of, or dealt with any of, the persons who subsequently came into contact with the securities.

How the securities came into the possession of Grimmett, Favata, and MacLaren for delivery in New York City to the agents of an Oklahoma insurance company was also never established by independent proof. Indeed, the alleged co-conspirators Favata and MacLaren freely acknowledged that they had at no time either met or dealt with the petitioner and did not consider him a participant in their dealings with Grimmett. Not even his name meant anything to them. In this situation, there was clearly no proof whatever of petitioner's connection to any conspiracy—much less one having interstate implications—, and nothing in the testimony of Grimmett's son-in-law, Gullihur—who denied any knowledge of the conspiracy or the purpose of an alleged payment to petitioner—altered this fact.

Taken as a whole, this evidence failed to show that petitioner's presence and conduct at Orseck's office "logically and consistently" pointed to the existence of a conspiracy in which he was a participant (*Butler* v. *United States*, 197 F. 2d 561 [10 Cir. 1952]). Neither did petitioner's presence or utterances indicate that he dealt "understandingly" with either Grimmett or "Hans", or the two of them, in connection with some projected criminal enterprise (*American Cyanamid Co.* v. *Sharff*, 309 F. 2d 790 [3 Cir. 1962]). In short, the case presented by the government depended upon the most rank speculation (see *United States*

v. *Rappaport*, 292 F. 2d 261, 264 [3 Cir. 1961]; *United States* v. *Moloney*, 200 F. 2d 344, 347 [7 Cir. 1952]) in order to by-pass the firm requirement that there be produced in the first instance independent proof of petitioner's informed and knowing participation in a criminal conspiracy having interstate ramifications (*Harlow* v. *United States*, 301 F. 2d 361 [5 Cir. 1962], cert. den. 371 U.S. 814; *Williams* v. *United States*, 289 F. 2d 598 [9 Cir. 1961]).

Upon a fair appraisal of the evidence, therefore, the case should never have been submitted to the jury. The jury's finding of guilt upon the conspiracy charge, however, is not difficult to fathom for the record was rife with testimony from both Favata and MacLaren that Grimmett had told them that one "Milt" would be the source of the stolen securities from which Grimmett expected to pay them for past criminal services. The "hearsay" of these alleged co-conspirators was thus lifted by "its own boot straps to the level of competent evidence". (*Glasser* v. *United States*, 315 U.S. 60, 74-75), and the conspiracy was "proved," if at all, "by evidence that is admissible only upon the assumption that the conspiracy existed" (*Krulewich* v. *United States*, 336 U.S. 440, 450, concurring opinion of JACKSON, J.; *United States* v. *Pagano*, 224 F. 2d 682, 684 [2 Cir. 1955]).

2. To warrant submission of the conspiracy count to the jury in the instant case, it was necessary for the government to present at least *prima facie* proof of the knowledge and intent of petitioner in regard to the interstate aspect of the offense (*Harms* v. *United States*, 272 F. 2d 478 [4 Cir. 1959]; *United States* v. *Crimmins*, 123 F. 2d 271 [2 Cir. 1941]). On this subject, the District Court observed

that the certificates in question "indicated that the transfer agents of the various corporations were located in various States, in addition to New York, and Parness was therefore on notice that in order to effect a transfer of ownership of the stock on the books of the respective corporations, it would be necessary for at least some of the stock certificates to be transported interstate" (Rec. p. 593a). The District Court's conclusion on this phase of the case is not only unwarranted for assuming that petitioner *actually knew* where all of the transfer agents would be located—but was additionally objectionable and incorrect for overlooking the fact that there was no testimony in the record that it was ever an object of the conspiracy to *sell* the securities. Indeed on this subject, Favata testified that Grimmett had told him that the securities would merely be pledged as collateral, repurchased and destroyed (Rec. p. 79a), and that no risk could be taken which might permit the securities to "show up at the transfer agent" (Rec. p. 85a).

In the government's brief in the Court of Appeals, it was observed by the prosecutor that the interstate transportation feature of the crime charged was satisfied by the statement of Grimmett in Orseck's office that the securities "might" be pledged with Grimmett's brother's bank in *Oklahoma* (government's brief below, p. 30). On this score, we point out that the remark actually attributed to Grimmett was that the securities were to be hypothecated and if there was difficulty in securing a loan, the securities "could" be pledged in Oklahoma "if need be" (Rec. p. 39a). That statement hardly portrayed an understanding among the alleged conspirators that the securities *would be* sent out of the State and in any case failed to meet the

standard imposed in *United States* v. *Crimmins*, 123 F. 2d 271, 273 (2 Cir. 1941) where the Court stated:

> "* * * there can be no conspiracy to 'cause' stolen securities 'to be transported in interstate * * * commerce' unless it is understood to be part of the project that they *shall* cross state lines." (Italics supplied.)

At all events, as the facts developed, Grimmett actually delivered the stolen securities to the agents of the Oklahoma insurance company in a hotel *in New York City*.

3. Prior to the trial, petitioner made a demand for a bill of particulars and sought therein the answers to the following questions, among others:

> "19. Are the securities referred to in Count II of the Indictment the same as referred to in Count I and or Count III?
>
> "20. Are the securities referred to in Count III the same as referred to in Count I and Count II of the Indictment?" (Rec. pp. 10a-11a)

The government's oral answer to these questions was: "The securities referred to in Count 2 and the securities referred to in Count 3 are the same securities referred to in Count 1" (Rec. pp. 12a, 98a, 102a).

From the government's reply, it appeared that all three counts of the indictment dealt with the same securities, namely, those which Grimmett had pledged at the end of November 1961. In this situation, the government had effectively limited itself to adducing proof only with respect to these securities (Federal Rules of Criminal Procedure, Rule 7(f), 18 U.S.C.; *United States* v. *Neff*, 212 F. 2d 297,

309 [3 Cir. 1954]). Instead, over petitioner's strenuous objections, the government proceeded to elicit from Favata and MacLaren, testimony involving entirely different securities which were to be acquired in the period subsequent to the November transfer. By this tactic, the government was able to introduce into evidence the highly prejudicial hearsay statements of Favata and MacLaren that Grimmett had informed them these new securities would be provided to Grimmett by "Milt". Through this device the prosecutor was also successful in introducing into evidence the testimony of Gullihur and the Berger hearsay (*supra*, p. 13) which dealt entirely with events coming well after the delivery in New York City of the stock referred to in all three counts of the indictment.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

SEYMOUR KLEINMAN
Counsel for Petitioner

Of Counsel:
MARVIN B. TEPPER
LAWRENCE K. FEITELL